IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 790 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
PARESH N DATANI & 1 - Respondents

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Appearance :

MR. M.A. PATEL, LD. APP for Appellant:
NOTICE SERVED for Respondents : 1 - 2.
MR. H.H. JOSHI FOR M/S THAKKAR ASSOC. for Respondents: 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 20/11/2006

ORAL JUDGMENT

1. Heard learned APP Shri. M.A. Patel for the appellant State and Shri. H.H. Joshi for M/s. Thakkar Associates for respondents / original accused.

2. The appellant State of Gujarat has preferred this appeal under section 378 of the Code of Criminal Produced 1973 (herein after referred to as the “Code” for the sake of brevity) challenging the order of acquittal passed by learned JMFC, Khambhalia, Kalyanpur, in Criminal Case No. 1352 of 1988 on 26/5/1995. This Court (Coram:A.N. Divecha, J) granted leave and admitted the appeal on 9/10/1996.

3. Brief facts leading to filing of this appeal deserve to be set out as under :

3.1 The complainant Food Inspector at the relevant time while discharging his duty at Khambhalia visited the firm of the accused on 12/8/1988 situated near Salaya Gate, run under the style and title of “Krishna Oil Mill”. The accused was holding license in the name of Paresh N. Dattani from the Municipality being License No. 446, that was exhibited at exhibit-66. Witness Shri. Jamnadas Karsandas Jusab had accompanied him as panch witness. The accused no.2 was managing the oil mill and he was present in the store. After introducing himself as food inspector and notifying his intention to collect the food sample, under Rule 12 Form No. 6 issued notice, whereon the signature of the accused was taken. The same was executed at exhibit-67. He purchased 375 grams oil on payment of Rs.5=00 in presence

of panch witness. The receipt for payment was obtained which is at exhibit-68. The said oil thereafter was transferred into clean, dried, odourless glass bottles in three equal parts and the glass bottles were thereafter sealed in accordance with law. The appropriate seal bearing serial number etc. was affixed thereon. The entire procedure was done in presence of panch witness and panchnama was drawn. The original panchnama is at exhibit-69. On 13/8/1988 out of three sealed bottles, one bottle was sent to the Public Analyst at Bhuj through State Transport Parcel Service. The memorandum of seal was prepared and sent separately. Necessary receipts were produced on the record. The receipt for receiving memorandum is at exhibit-73. Remaining two samples were sent to Local Health Authority at Rajkot, receipt thereof is at exhibit-74. The receipt received from Local Health Authority is at exhibit-75 and the report is produced at exhibit-76. The details of sample is at exhibit-77. The Public Analyst opined that the sample oil was not in accordance with provisions of Prevention of Food Adulteration Rules, 1955 (herein after referred to as the 'Rules” for brevity) and therefore it was declared to be adulterated. The appropriate report was made to Local Health Authority for lodging complaint against the accused. The said report is at exhibit-78. The Local Health Authority, Rajkot issued sanction for lodging prosecution vide its

order dated 5/10/1988 which is produced at exhibit-79. The complaint came to be lodged which was numbered as 5312 of 1988. Notice under section 13 (2) of the Act came to be issued by Local Health Authority to the accused on 11/2/1989 that is at exhibit-82. The postal acknowledgment due intimating that the notice was received by accused no.1 is at exhibit-83. The postal acknowledgment intimating receipt thereof by accused is at exhibit-84. The accused denied the charge and claimed to be tried. After recording evidence, further statement of the accused came to be taken under section 313 of the Code wherein accused denied the case of the prosecution. The trial court after considering records & proceedings, came to the conclusion that there was breach of provision of Section 13(2) of the Rule 17 and therefore benefit of doubt was accorded to the accused and they were acquitted vide judgment & order of acquittal dated 26/5/1995 which is impugned in the present appeal.

4. Shri. Patel learned APP has vehemently urged that the notice under section 13 (2) of the code has been duly served upon the accused / respondents and even a cursory glance at postal acknowledgment due would show that they were received by someone on behalf of the accused. Shri. Patel has submitted that, in any case when the notices were issued on the declared address

and somebody had received and postal acknowledgment dues have been produced on record, the trial court ought not to have erroneously held that the notices have not been received by the accused. Shri. Patel has submitted that the trial court has erroneously held that the sanction appeared to have been issued without application of mind. Shri. Patel has submitted that the report of the Public Analyst clearly indicate that the oil in question was not in conformity with the standards laid down of PFA Rules 1955, and therefore the trial court ought not to have given benefit of doubt and acquitted them only on technical breach if any committed by the prosecution and or Local Health Authority.

5. Shri. Joshi, learned counsel for the respondents has submitted that the impugned judgment of acquittal deserve to be confirmed as it is established beyond doubt that the notice under section 13 (2) of the Act had never been received by the accused. Shri. Joshi has referred the testimony of complainant which has been recorded at exhibit-65 and submitted that he has admitted that the postal acknowledgment due purported to be document of receipt at exhibits 83 and 84 did not bear the signature of accused no.1 and 2, and it bears signature of one Shri. Vira Sura. Shri. Joshi has relied upon various decisions of this Court and submitted

that, when there is defence put up that the notices under section 13 (2) of the Act were not received by the accused and the postal acknowledgment due cards did not bear signature of the accused and it is admitted that the signatures were not those of accused, it can well be said that the prosecution has not established beyond doubt the receipt of notices under section 13 (2) of the Act. This Court in case of Criminal Appeal No. 204 of 1979 decided on 8/12/1980 has come to the conclusion that when the postal acknowledgment card bears the signature of any person other than the one to whom it came to be addressed then, no presumption of receipt can be drawn. On the contrary even if this presumption is available under section 114, same stands rebutted. Shri. Joshi has relied upon decision of this Court (Coram: S.R. Brahmbhatt, J) in Criminal Appeal No. 936 of 1996 decided on 5/8/2005 wherein this Court relying upon earlier decision of this Court in case of State of Gujarat Vs. Dhulabhai Atabhai in Criminal Appeal No. 204 of 1979 decided on 8/12/1980 held that when the postal acknowledgment card bears the signature of any other person, then the one to whom it was addressed, then no presumption of receipt can be drawn and it can not be said to have been served on the same person. Shri. Joshi has also relied upon another decision of this Court (Coram: Akil Kureshi, J) decided on 31/3/2006 in support

of his submission.

6. This Court has perused the records & proceedings and heard learned counsels of the respective parties at length. This acquittal appeal deserve to be dismissed only on the ground that the prosecution has failed in establishing service of notices under section 13 (2) of the Act upon the accused. Testimony of the complainant Food Inspector recorded at exhibit-65 bears admission on the part of the complainant that the postal acknowledgment due exhibit- 83 and 84 did not bear the signature of any of the accused. It also clearly indicate that the postal acknowledgment dues were signed by one Vira Sura, whose whereabouts are not known to any one, nor was the postman examined by the prosecution. No other attempt is made to establish that the accused were served with notices under section 13 (2) of the Act. The Apex Court has clearly held in case of MUNICIPAL CORPORATION OF DELHI Vs. GHISA RAM, reported in 1975 (1) FAC 186, that, there has to be due compliance with provisions of Section 13 (2) of the Act. The opportunity envisaged under section 13(2) to the accused is mandatory and to be afforded to the accused. Non compliance with provision of section 13(2) would vitiate the prosecution.

7. In the instant case it has clearly come out in

the testimony of the complainant food inspector that the postal acknowledgment due bear signature of one Vira Sura, whose whereabouts are not known to any one. There is no other evidence available in any form to establish that accused no.1 and 2 were duly served with notice under section 13 (2) of the Act, along with report of public analyst containing information that the sample article was adulterated.

8. This being an acquittal appeal this Court is mindful of the fact that ordinarily the order of acquittal is not to be interfered unless & until it is emphatically demonstrated by the appellant that the findings and reasonings adopted by the trial court for recording acquittal are so perverse as to result into miscarriage of justice. In absence of such plea the findings of acquittal need not be interfered with. In the instant case, as it is stated herein above, the order of acquittal is based upon prosecution's failure in establishing due compliance with section 13 (2) of th Act, which seems to be just and proper and it warrants no interference under the present appeal.

9. In view of this, this Court is of the considered view that the judgment & order of acquittal dated 26/5/1995 passed by Learned JMFC, Khambhaliya, Kalyanpur, in Criminal Case No. 1352 of 1988, acquitting the present respondents

/ original accused does not call for any interference. In the result, the appeal deserve to be dismissed and the same is accordingly dismissed.

[S.R. BRAHMBHATT, J]

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